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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 435

GRADY L. WEST and CLIFFORD C. GRAHAM,

Petitioners,

vs.

EDWARD M. GILBERT, E. L. BRUCE CO., INCORPORATED, CORALOC INDUSTRIES, INC., WILLIAM A. FIO RITO, ISRAEL G. SEEGER, and VINCENT D'SUSA,

Respondents.

PETITIONERS' REPLY BRIEF

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Respondents.

PETITIONERS' REPLY BRIEF

It is perfectly plain from the Statement in Petitioners' Petition that none of the Respondents or their counsel knew of the dismissal of this action until counsel for Petitioners discovered the event and notified them thereof on September 17, 1965. It is also clear that no Respondent or their counsel knew or realized that an adjournment had not been granted on the June 5, 1964 calendar call—since all continued with the action even after the dismissal. It is further clear that Petitioners' counsel and Petitioners did continue actively in connection with the case subsequent to the deposition of Robert C. Leonhardt and that, *immediately* on learning of the dismissal, they took appropriate steps to vacate it and to restore the case to the calendar. It is also clear from the record that the action

was commenced August 23, 1962 and the order of dismissal entered just two years later on August 21, 1964 and that the Second Circuit was clearly in error when it said the case was two and one-half years old in June 1964.

The theory of the action is based on the fraud of the Respondents under Section 10(b) of the Securities Act of 1934 and Rule 10b-5 of the General Rules and Regulations promulgated thereunder. Thus the applicable statute of limitations is the six year limitation of Section 213(9) of the New York Civil Practice Law and Rules, since it was in New York that the alleged actions of Respondents occurred and in which the District Court is located. *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783, 787 (2nd Cir. 1951); *Osborne* v. *Mallory*, 86 F. Supp. 869 (S.D.N.Y. 1949); *Philip* v. *J. H. Lederer Co., Inc.*, 1957—61 CCH Fed'l Sec. Rep., Par. 91039 (S.D.N.Y. 1961).

Pursuant thereto, the earliest date for the commencement of the running of such statute would be April 6, 1962, the date of the "conference" between Petitioners and Respondents. Despite their ability to reinstitute the action, Petitioners chose to move to vacate the dismissal, and thereafter to appeal to the Second Circuit and now to petition this court for certiorari, as it is their belief that the dismissal without notice, the refusal to vacate the dismissal and the failure to reverse such refusal, constitute an abuse of discretion under the circumstances present and in order to preserve in full effect voluminous pre-trial efforts in the action.

It is submitted that the merits of Petitioners' claims have been fully set forth and that the matter falls within the ambit of *Surowitz* v. *Hilton Hotels Corporation*, 383 U. S. 363; and that the decision of the Court of Appeals for the Second Circuit is in conflict with *Hill* v. *Hawes*, 320 U. S. 520 and *Radak* v. *Norwegian American Line Agency, Inc.*, 318 F. 2d 538 (2d Cir. 1963) and *Tozer* v. *Charles D. Krause Milling Co.*, 189 F. 2d 242 (3rd Cir. 1951).

CONCLUSION

It is respectfully submitted that, for the reasons set forth in the Petition for Certiorari and above, the Writ should issue.

Respectfully submitted,

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Counsel for Petitioners.

JAMES L. ADLER, JR.,
Of Counsel.
October 7, 1966.

END